

JENNIE L. EVARTS
Claimant

AUBURN ANIMAL CLINIC
Respondent

STATE FARM FIRE & CASUALTY CO.
Insurance Carrier

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ORDER

ISSUES

Respondent argues claimant is making this claim for a work-related injury in retaliation of respondent terminating her employment. Additionally, respondent claims that claimant's right shoulder injury is causally related to her other work duties she was performing at three part-time jobs at the same time she was employed full-time for the respondent.

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

(1) Claimant alleges she injured her right shoulder while performing her regular work activities for the respondent. At the time of her alleged injury, claimant had been employed by the respondent for nine years performing cleaning duties and duties involving the care of the animals at the clinic. Claimant testified that on or about June 1, or June 2, 1998, she felt a pop in her right shoulder as the rottweiler dog she was walking pulled her shoulder when the dog jumped at a cat. She further testified, as she continued to perform her work activities cleaning respondent's veterinary clinic and working with the animals, her right shoulder worsened through her last day worked on June 15, 1998.

Respondent terminated claimant on June 17, 1998, after claimant had notified the respondent by telephone she was not able to attend a mandatory staff meeting because she had passed out at home. After this telephone call, both of the co-owners of respondent's veterinary clinic went over to claimant's house because they were concerned for claimant's safety. They received no response from claimant when they arrived at the house. The local fire department and the sheriff's office were then notified and personnel from both of these agencies responded to claimant's home. Finally, the sheriff deputy kicked down the front door and found claimant sitting alone on the arm of the couch in her living room.

Claimant testified to a bizarre story of leaving the house, obtaining medical treatment, and returning to the house just before the sheriff officer entered her home. Claimant testified she left her house and returned with a cousin who was visiting from Texas. Claimant testified another cousin that was visiting from Texas remained in the house while she was gone. However, claimant did not remember the last names of the cousins.

Medical records introduced into evidence indicate claimant had sought treatment on her own for her right shoulder with her family physician, Michael L. Laccheo, M.D., and Dr. Lynn Betz, a local chiropractor. However, the medical records do not relate a history of claimant injuring her shoulder at work.

At the same time claimant was working full-time for the respondent, she also was employed part-time cleaning a local dentist office, cleaning the local post office, and delivering newspapers. She testified she threw the newspapers from her car with her left arm and not her right arm.

Respondent contends claimant's testimony is inconsistent concerning how and when she injured her right shoulder. Respondent argues claimant cannot be believed because of this inconsistency in her testimony and the bizarre story she made up concerning the incident that occurred at her home on June 17, 1998. Respondent further argues that claimant's injured shoulder most likely occurred while she was performing her other part-time jobs and claimant is making the claim for her shoulder injury in retaliation of the termination by the respondent.

The Appeals Board agrees with the respondent that there is some inconsistency in claimant's testimony in reference to her right shoulder injury and further, the story she related as to what happened in her home on the afternoon of July 17, 1998, is difficult, if not, impossible to believe. Furthermore, the Administrative Law Judge also made a comment at the conclusion of the Preliminary Hearing Transcript as to the inconsistency of claimant's testimony and he questioned the truthfulness of the story she related as what occurred at her home on June 17, 1998. Nevertheless, the Administrative Law Judge found the preliminary hearing record, as a whole, proved more likely than not that claimant's right shoulder injury occurred while she was performing her work activities for the respondent.

The claimant; respondent's co-owners, Drs. Zander and Caster; office manager, Francis Seemans; and receptionist, Jennifer Suttles; all testified in person before the Administrative Law Judge at the preliminary hearing. Although the Administrative Law Judge questioned the truthfulness of an incident that occurred at claimant's home on the date of her termination, he believed her testimony that she injured her right shoulder while working for the respondent. The Appeals Board finds some deference should be given to the Administrative Law Judge's conclusions because he had the opportunity to personally assess all the witnesses' demeanor and judge their credibility. At this juncture of the proceeding, the Appeals Board concludes, giving some deference to the Administrative Law Judge, that claimant's right shoulder injury occurred while working for the respondent.

(2) Claimant's attorney sent a demand letter dated June 26, 1998, to respondent requesting medical treatment for claimant's right shoulder injury. Respondent received that letter on June 27, 1998. The Administrative Law Judge found claimant's appropriate date of accident was June 15, 1998, her last day worked. Therefore, the Administrative Law Judge found, by not counting the immediate Saturday and Sunday, the demand letter was received by the respondent within 10 days and, therefore, was timely. See McIntyre v. A. L. Abercrombie, Inc., 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

The Appeals Board finds timely notice but finds claimant notified Dr. Dallas Caster, one of respondent's co-owners, the day she initially injured her right shoulder. Claimant testified, after the rottweiler dog lunged and pulled her shoulder, she told Dr. Caster about the incident. During Dr. Caster's testimony, he acknowledged claimant had notified him that her shoulders were sore because one of the big dogs she was walking had jerked on the leash causing soreness in her shoulders. The Appeals Board finds this testimony satisfies the 10-day notice requirement as set forth in K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's preliminary hearing Order For Medical Treatment dated August 7, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

c: George H. Pearson III, Topeka, KS
Rex W. Henoch, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director